Supreme Court, U.S.
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No. 99-1457

In The

Supreme Court of the United States

ROY RICHARD DITTMAN,

Petitioner,

v.

STATE OF CALIFORNIA AND CONSUMER AFFAIRS AGENCY, MEDICAL BOARD OF CALIFORNIA, ACUPUNCTURE COMMITTEE, and MARILYN NIELSEN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether section 7(a) of the Privacy Act of 1974 is enforceable in federal court? And if so, does California Business and Professions Code section 30, which requires disclosure of one's social security number as a condition of renewing a professional license, violate the Act?

2. Whether requiring an applicant for a professional license to disclose his social security number as a condition of renewing a professional license violates the applicant's due process rights.

3. If California Business and Professions Code section 30 is determined to violate the Privacy Act or petitioner's due process rights, is petitioner entitled to equitable relief and/or damages?

PARTIES TO PROCEEDINGS

The parties to the Court of Appeals proceeding are the following:

Petitioner: ROY RICHARD DITTMAN

Respondents: STATE OF CALIFORNIA STATE AND CONSUMER AFFAIRS AGENCY, MEDICAL BOARD OF CALIFORNIA, ACUPUNCTURE COMMITTEE, and MARILYN NIELSEN

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BRIEF IN OPPOSITION TO PETITION TO WRIT OF CERTIORARI

Respondent respectfully files this brief in opposition to the Petition For Writ Of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Petitioner was a licensed acupuncturist in the State of California from 1983 to 1995. In 1995 his application to renew his license was rejected by respondents for failure to provide his social security number (SSN) on his application as required by California Business and Professions Code section 30. On September 21, 1995, petitioner was notified by the Acupuncture Committee of the California Medical Board that failure to provide his social security number would result in denial of a license. Petitioner refused to provide the State of California his social security number and on October 31, 1995, his license expired.

On October 30, 1997, petitioner filed an action pursuant to 42 U.S.C. section 1983, alleging that respondents' refusal to renew his license violated the due process clause of the Fourteenth Amendment and that requiring disclosure of his social security number as a condition to licensure violated 7(a)(1) of the Privacy Act. On June 23, 1998, the district court granted summary judgment in respondents' favor.

Petitioner filed a timely appeal to the Ninth Circuit Court of Appeals. On September 14, 1999, the Ninth Circuit affirmed the ruling of the District Court.

REASONS FOR DENYING THE WRIT

A. THE COURT OF APPEAL'S DECISION IS NOT INCONSISTENT WITH THIS COURT'S AUTHORITY

1. THE COURT OF APPEAL'S DECISION IS NOT INCONSISTENT WITH *SCHWARE V. BOARD OF BAR EXAMINERS OF NEW MEXICO*

Petitioner contends that the appellate court's decision is in direct contradiction to this Court's ruling in *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957). However, *Schware* is inapplicable here because in that case this Court addressed the issue of denying a professional license based on the applicant's *qualifications*. In the instant case, petitioner was denied a license for refusing to provide *identifying information*.

In *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957), Schware had applied to take the New Mexico bar examination but was denied the opportunity based on moral character grounds. Specifically, Schware had disclosed that he had used certain aliases between 1933 and 1937 and that he had been arrested on several occasions prior to 1940. (*Id.* at 234.) Additionally, the Board had received confidential information that Schware had once been a member of the Communist Party. (*Id.* at 235.) Schware requested a hearing on the matter. At the hearing Schware called his wife, his rabbi, a local attorney, and the secretary to the dean of the law school to testify about his character. Schware took the stand himself and was subjected to thorough examination by the Board. He also introduced letters he had written his wife from 1944 through 1946 while on active duty in the Army

and letters from all but one member of his law school graduating class regarding his moral character. The Board presented no evidence. (*Id.* at 235-6.) According to the Court, nothing in the record of the hearing suggested that Schware had engaged in any conduct which reflected adversely on his character. (*Id.* at 236.)

The Court found that denying Schware the opportunity to take the bar examination violated his due process rights, explaining that "[a] state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any *qualification* must have a rational connection with the applicant's fitness or capacity to practice law." (Emphasis added.) (*Id.* at 239.) The court further explained that "[o]bviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory." (Ibid.)

Schware is inapposite. In the instant case, petitioner was not denied the opportunity to pursue a profession based on his failure to meet a *qualification*, but on his refusal to provide identifying information – his social security number. Business and Professions Code section 30 prohibits any licensing board from processing any application for an original or renewed license unless the applicant provides its federal employer identification number or social security number. (Business and Professions Code § 30(c).) Although section 30(j) states that the Legislature intended to use the number to establish the

identification of persons affected by tax laws and for purposes of compliance with child support laws, it does not state that any applicant will be denied a license because he has not complied with either of these laws.

In sum, California Business and Professions Code section 30 provides for the denial of a professional license for failure to provide identifying information, not for failure to meet a qualification. Consequently, the criteria set forth in *Schware* is simply inapplicable in this case.

2. THE COURT OF APPEAL'S DECISION IS NOT INCONSISTENT WITH *MAINE V. THIBOUTOT*

In support of his contention that the Privacy Act is enforceable against the State, petitioner cites *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), and argues that the Court of Appeal's decision is inconsistent with it.

Respondent incorporates by reference the Court of Appeal's decision regarding enforceability of the Privacy Act against the State. With regard to petitioner's reliance on *Maine*, that case presents a different issue than that presented in the instant case.

In *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), the Thiboutots brought suit pursuant to 42 U.S.C. section 1983 against the State of Maine and its Commissioner of Human Services alleging a violation of the federal Social Security Act (42 U.S.C. § 602(A)(7).) The Thiboutots were married and had eight children, three of whom were Mr. Thiboutot's from a previous marriage. When the Department of Human Services computed their AFDC benefits, the Thiboutots were not given an allowance for the five

children which were exclusively Mr. Thiboutot's, notwithstanding that he was legally obligated to support them. (*Id.* at 3.) The Thiboutots brought suit pursuant to section 1983 challenging the State's interpretation of the Social Security Act. (*Id.* at 3.) The issue before the court was whether section 1983 encompasses claims based on purely statutory violations of federal law. (*Id.* at 2.) The court referred to the language of section 1983, which creates liability for every person who, acting under color of State authority, causes the deprivation of "any rights, privileges, or immunities *secured by the Constitution and laws* . . . " The question addressed by the court was whether the phrase "and laws," as used in section 1983, should be limited to some subset of laws. (*Id.* at 4.) The State had argued that the phrase "and laws" should be read as limited to civil rights or equal protection laws. (*Id.* at 6.) The court determined that "the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act." (*Id.* at 4.)

The instant case presents a different issue than that presented in *Maine*. Here, the State is not arguing that petitioner cannot sue for a violation of the Privacy Act via section 1983 because section 1983 applies only to some limited subset of laws. Rather, petitioner's action is barred because the Privacy Act simply does not provide a "right . . . secured by the Constitution or laws" . . . against any state – only against federal agencies. As explained by the appellate court below, Congress has expressly limited private enforcement of the Privacy Act

to actions against agencies of the United States Government.[1]

No such action lies against state or local agencies. In other words, because enforcement of the Privacy Act is expressly limited to federal agencies, section 1983 cannot be used to circumvent the intent of Congress by providing for enforcement against State agencies.

B. THE COURT OF APPEAL'S DECISION DOES NOT CONFLICT WITH OTHER FEDERAL COURTS' RULINGS ON THE PRIVACY ACT.

Petitioner contends that the Ninth Circuit decision that the Privacy Act cannot be enforced against the State conflicts with decisions of other circuits.

In support of his argument petitioner lists eight cases which address alleged Privacy Act violations by state agencies. However, none of those cases hold that the Act is enforceable against state agencies and thus none of

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[1] Section 5 U.S.C. section 552a(g)(D) creates a right of action for an individual to sue an agency. Section 552(a)(10) provides that "[f]or purposes of this section – (1) the term 'agency' means agency as defined in section 552(e) of this title." Section 552(e) refers to agency as defined in section 551(1) of the same title. (See 5 U.S.C. § 552(f).) Section 551(1) lists the various federal agencies to which it applies. (See *St. Michael's Convalescent* v. *State of Calif.*, 643 F.2d 1369 (9th Cir. 1981) (holding that under § 551(1), "agency does not encompass state agencies or bodies."). Thus, the provision creating a right of action for the Privacy Act refers only to the right to sue federal agencies, and not state agencies.

them creates a split in the circuits. Respondent incorporates by reference the Court of Appeal's decision regarding enforceability of the Act against states.

Petitioner cites *Green* v. *Philbrook*, 576 F.2d 440 (2nd Cir. 1978); *Chambers* v. *Klein*, 419 F.Supp. 569 (D.C.N.J. 1978); *Greater Cleveland Welfare Rights Org.* v. *Bauer*, 462 F.Supp. 1313 (N.D. Ohio 1978); *McElrath* v. *Califano*, 615 F.2d 434 (7th Cir. 1980); *Doe* v. *Sharp*, 491 F.Supp. 346 (D.Mass. 1980); *Doyle* v. *Wilson*, 529 F.Supp. 1343 (D.Delware 1982); *Yeager* v. *Hackensack Water Co.*, 615 F.Supp. 1087; (D.C.N.J. 1985); and *Greidinger* v. *Davis*, 988 F.2d 1344 (4th Cir. 1993). Of the eight cases, five simply do not discuss the issue of whether the Privacy Act provides a private right of action against states. (See *Green, Chambers, McElrath, Greidinger*, and *Doe*.) One, *Doyle*, acknowledged that "at least one Court has questioned whether section 7 can support a private right of action for retrospective relief," but did not reach the "thorny issue" because it found that "damages against [the defendants] were barred by the doctrine of official immunity." (*Doyle* v. *Wilson* 529 F.Supp. 1343, 1350 (1982).) The remaining two cases, *Greater Cleveland Welfare Rights* and *Yeager*, are district court cases which hold that the Privacy Act provides a private right of action, but they do not address the issue of whether the Act provides a right of action against *state* agencies. Thus, petitioner has failed to cite one case which holds that the Privacy Act provides a private right of action against state agencies.

Furthermore, *Greater Cleveland Welfare Rights* and *Yeager*, the only two cases cited by petitioner which even address the issue of whether the Privacy Act provides a private right of action at all, are district court cases

which, of course, cannot create a split of authority among the circuits.

Petitioner also relies on *Wolman* v. *United States of America, Selective Service System*, 501 F.Supp. 310 (1980), a case out of the District Court for the District of Columbia. First, Wolman was *vacated* July 8, 1982. Further, *Wolman* was a case brought against the federal Selective Service in which the plaintiffs alleged that the Selective Service's requirement that registrants supply their social security numbers violated the Privacy Act. One exception to the Privacy Act exists where obtaining social security numbers is directed by statute (5 U.S.C. § 552(a) (note) (1976)). The law reinstituting registration for the draft did not, at that time, contain a provision which authorized the Selective Service to obtain SSN's. Consequently, the court found that the Selective Service's practice of requiring each registrant to disclose a SSN violated the Privacy Act. Subsequently, the Military Selective Service Act was amended to provide the necessary statutory authority to require submission of SSN's by draft registrants. The Selective Service had apparently appealed the district court's ruling and the Court of Appeal remanded the case to the district court for further consideration in light of the statutory amendment. On remand, the district court granted the Selective Service's motion to dismiss because there was no longer any basis for holding that its regulation requiring registrants to submit SSN's was in violation of the Privacy Act. (*Wolman* v. *United States of America, Selective Service System*, 542 F.Supp. 84 (1982).)

Wolman is of no consequence here because (1) it was vacated, (2) it did not involve a state defendant, and, of course, there was no issue whether the Privacy Act could

be enforced against the State, and (3) it was a district court case and thus could not create a split in the circuits.

Petitioner refers to *Brookens* v. *United States*, 627 F.2d 494 (D.C. Cir. 1980). In that case, the plaintiff, a federal employee, sued the federal State Department for denying his travel advances based on his refusal to provide his SSN. Plaintiff alleged that the requirement violated the Privacy Act. The government contended, based on subparagraph (a)(2) of section 7 of the Act, that the Privacy Act was not violated because the Act does not apply to an agency maintaining a system of records existing before January 1, 1975. The government filed a 12(b)(6) motion with an affidavit stating that they had such a system of records. The motion was considered as a motion for summary judgment and was granted by the district court. The appellate court upheld the dismissal.

Brookens does not support petitioner's argument because it did not involve a state defendant. Neither the district court nor the appellate court addressed whether the Privacy Act can be enforced against the State.

CONCLUSION

Because petitioner has failed to demonstrate why this Court should grant certiorari, his petition should be denied.

Respectfully Submitted,

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